Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1975

Number 76-12

BOBBY JOE UPTON,

Petitioner,

-vs-

THE STATE OF GEORGIA

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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THE STATE OF GEORGIA

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BOBBY JOE UPTON Petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in the Case of (#30939) *LAWSON* et al (*BOBBY JOE UPTON*) vs *The State of Georgia* on the 20th day of April 1976.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of

Georgia are as yet unreported but are appended hereto in the appendix, and will be officially reported in 236 Ga. 770.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia was dated and entered on April 20, 1976. A rehearing in said judgment was denied by the Supreme Court of Georgia on May 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States of America.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the provisions of Georgia Code Ann. Section 26-3004 (Ga. Laws 1968, pp. 1249, 1328 as Amended, Ga. Laws 1972, p 615, and Ga. Laws 1972, pp 952, 953) are repugnant to the IV, V and XIV Amendment to Constitution of the United States in that same fails to meet the requirements set out by the United States Congress in 18 U.S.C. Sections 2510-2520 (Part of Omnibus Crime Control and Safe Streets Act of 1968) and thus was unconstitutionally applied to Petitioner in an unreasonable search and seizure involving telephone intercept and later search of residence.

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held . . . nor be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Georgia Code Ann. Section 26-3004. (Ga. Laws 1968, pp 1249, 1328 as Amended, Ga. Laws 1972, p 615, and Ga. Laws 1972, pp 952, 953)

26-3004 Law enforcement officers—exception

(a) Except only as provided in subsection (b) hereof, nothing in this Chapter shall apply to a duly constituted law enforcement officer in the performance of his official duties in ferreting out offenders or suspected offenders of the law, or in secretly watching a person suspected of violating the laws of the United States or of this State, or any subdivision thereof, for the purpose of apprehending such suspected violator.

(b) When in the course of his official duties, a law enforcement officer desiring to make use of any device, but only as such term is specifically defined by section 26-3009, and such use would

otherwise constitute a violation of section 26-3001, such law enforcement officer shall act only in compliance with the procedure provided for herein in subsections (c) through (k) inclusive.

(c) When there is probable cause to believe that a person is committing or has committed an act which endangers the national security of the United States or the security of this State or that such person is committing or has committed the crime of treason, insurrection, rebellion, espionage, sabotage, or any felony involving bodily harm, or any crimes involving kidnapping, narcotics, dangerous drugs, burglary, prostitution, theft, blackmail, extortion, bribery, gambling or any felony involving alcholic beverage laws, auto thefts, or there is probable cause to believe that a private place is being utilized or has been utilized for the commission of any such crime, then upon written application, under oath, of the district attorney of the circuit wherein the device is to be physically placed, or the Attorney General, which application affirms that there is probable cause to believe (1) that a person is committing or has committed any of the crimes enumerated in this subsection, or (2) that a private place is being utilized or has been utilized for the commission of any of the crimes enumerated in this subsection and sets forth specifically the basis of such probable cause and particularly describes the person or place, the crime or crimes, the device or devices to be used, and the specific conversations and activities to be overheard or observed, as the case may be, any judge of the superior court of the circuit aforesaid may issue an investigation warrant permitting the use of devices, as defined by section 26-3009, for the surveillance of such person or place provided such warrant specifies with particularity the device or devices the use of which is to be thereby permitted, the purpose, duration and circumstances of use permitted, the crime or crimes allegedly being committed, and the person or persons and place or places to be subject to such surveillance.

(d) The judge before issuing such a warrant, shall satisfy himself that the party initiating the application for the warrant is aware of facts and circumstances through his own personal knowledge which are sufficient to lead a man of reasonable caution to believe that the alleged crime set forth in the application has been committed or is being committed, or that such person has been informed of such facts and circumstances by a reasonably trustworthy informational source. The judge shall also satisfy himself that there is set forth in the application exigencies adequately supported by facts and circumstances which overcome and override the need for giving of notice of the surveillance to the parties to be overheard or observed by the use of such devices.

(e) Investigation warrants issued under this section shall be valid for no more than 20 days after issuance, unless renewed for an additional 20-day period for good cause shown at the time of written application for such renewal.

(f) The officer executing the warrant must make a return of the warrant to the judge which shall set forth specifically how such warrant was used and employed and what was obtained thereby. The return shall reflect that the investigation or search in pursuance of the warrant was terminated immediately upon the conversation or activities which were authorized to be overheard, intercepted or observed were obtained. The return shall set forth with particularity the law enforcement officer or officers or their agents who actually employed the devices used in the execution of the warrant.

(g) Evidence obtained in conformity with this section shall be admissible only in the courts of this State having felony and misdemeanor jurisdiction. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications or in observation in the manner authorized herein, intercepts wire or oral communications or obtains fruits of observation relating to offenses for which an investigation warrant may issue other than those specified in the order of authorization, the contents or fruits thereof, and evidence derived therefrom, may be disclosed or used in the same manner as if a surveillance warrant covering said crimes had initially been used.

(h) The application for any investigation warrant under this section, any supporting evidence in connection therewith and any entry of the issuance of an investigation warrant as a result thereof shall remain confidential and in the custody of the judge and shall not be released, nor information touching same in any maner be disclosed, except upon written order of such judge, or except at the time of trial of the case in which such evidence is used or in which evidence derived from such surveillance is used.

(i) The applicant for the warrant shall return same and report back to the judge issuing same within 30 days of the issuance of the warrant. In the event no evidence of one of the specific crimes set forth in this section has been obtained through the use of such device or devices, it shall be the duty of such applicant to physically destroy all evidence obtained by surveillance and to so certify in writing to such judge under oath.

(j) In the event evidence of or information concerning the specific crime set forth in the warrant is obtained through the use of such device or

devices the applicant shall so certify in writing under oath in his report under subparagraph (i). Upon the return of an indictment or filing of an accusation based in whole or in part on such evidence or information or any part thereof, it shall be the duty of the solicitor general to promptly notify the accused of the existance and substance of such evidence or information and if the same has been reduced to a permanent form, shall make it available to the accused for inspection and copying.

(k) Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution.

(l) (a) It shall not be unlawful under the provision of this Chapter for an officer, employee, or agent of any communication common carrier to provide facilities or technical assistance to an investigative or law enforcement officer, who, pursuant to this section, is authorized by warrant to intercept a wire or oral communication.

(b) An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith with such technical information, facilities, and technical assistance as is necessary to accomplish the interception unobtrusively and with minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communi-

cation common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant at the prevailing rates.

(c) A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this Chapter or under any other law.

(Acts 1968, pp. 1249, 1328; 1972, p, 615; 1972, pp. 952, 953.)

STATEMENT OF CASE

Petitioner BOBBY JOE UPTON subscribed to telephone service at his residence under telephone #461-1927 and 461-3230 and by virtue of affidavit of L. M. Smart, Special Agent, Georgia Bureau of Investigation dated September 23, 1974, and Petition of District Attorney Ben J. Miller dated the same day, Intercept Order was also granted the same day by Honorable Andrew J. Whalen, Jr., Judge, Griffin Judicial Circuit, these items appended in the appendix. As a result of intercepted telephone communications, BOBBY JOE UPTON'S residence was the subject of a search warrant and results of search thereof only showed that telephone #461-1927 had an extension line and phone in the next door residence, the place of abode of his mother-in-law Octavia Patricia Hall. All alleged gambling communication being intercepted therefrom originated in her residence and without Petitioners knowledge. Petitioner, BOBBY JOE UPTON was indicted by the Grand Jury of Clayton County, Georgia on the 4th day of March 1975 along with Octavia Patricia Hall and Bobby James Lawson her friend and charged in two counts with Communicating Gambling Information, Violation of Ga. Code

Ann. Sec. 26-2706. Motion To Suppress was timely made same being appended in the appendix, wherein the issue was made that Ga Code Ann. Section 26-3004 did not conform to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and thus violated the IV and V and XIV Amendment to the Constitution of the United States and telephone intercept and fruits therefrom along with derivative evidence produced thereby should be suppressed. A hearing was had on this Motion, wherein Petitioner's mother-in-law, Octavia Patricia Hall acknowledged that she was in the lottery business. This Motion was overruled and denied as to all defendants and the matter proceeded to trial without a jury before Honorable Joseph Jackson, Judge, Coweta Judicial Circuit. Objections were made and overruled during the entire trial in regard fruits of unlawful and unreasonable telephone intercept and search and seizure. The Court found Petitioner and other defendants, Bobby James Lawson and Octavia Patricia Hall guilty on two Counts of Communicating Gambling Information and Petitioner and these two others were sentenced to two to five (5) year sentences and to two Twenty-Five Hundred Dollar ($2,500.00) fines, the two five year sentences to run concurrent and total of fines to be Five Thousand Dollars. An appeal was taken to the Supreme Court of Georgia where judgment of the lower court was affirmed April 20, 1976. Motion For Rehearing was filed and denied May 20, 1976.

MANNER OF RAISING FEDERAL QUESTION

Petitioner by Written Motion To Suppress as well as by oral Motions and objections made during the trial

challenged the constitutionality of Ga. Code Ann. Section 26-3004 and the legality of the telephone intercept order and search and seizure thereunder, the introduction of fruits of such intercept and deriverative evidence therefrom. In the appeal to the Supreme Court of Georgia an attack was made on the constitutionality of Ga. Code Ann. Section 26-3004 (Ga. L. 1968, pp. 1249, 1328 as amended, Ga. L. 1972, p. 615, and Ga. L. 1972 1972, pp. 952, 953).

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

The decision of the Supreme Court of Georgia is contrary to the express requirements of the United States Congress as set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968; Sections 2510-2520 inclusive, Title 18 U.S. Code and dictates of the IV, V and XIV Amendments to the Constitution of the United States.

The question involved is of great gravity and importance in the administration of the criminal laws in all state and federal trials in regard to the right of a defendant against an illegal telephone intercept and illegal and unreasonable search and seizure thereby in violation of his constitutional rights, and the introduction of the fruits of such searches and seizures and derivative evidence therefrom during his trial.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

The Supreme Court of the United States held that Title III of the Omnibus Crime Control and Safe Streets

Act of 1968 does require suppression of wire tap evidence for not only constitutional violations but also for certain nonconstitutional procedural defects. *U.S. vs Giordano,* (1974), 505 U.S. 416, 94 S. Ct. 1820, 40 L. Ed. 2d 341 stated: Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

Since Georgia Code Annotated Section 26-3004 does not conform to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Sections 2510-2520 inclusive, Title 18 U.S. Code, it is unlawful and hence provides no legitimation of the interceptions herein;

1) Ga. Code Ann. Sec. 26-3004 makes no provision, as does Section 2518 (6) Title 18 U.S. Code for the making of reports to the Judge who issued the Order showing what progress has been made toward achieving the authorized objective and the need for continued interception.

2) Ga. Code Ann. Sec. 26-3004 does not require the inclusion in each application, as does Section 2518 (1) (d) of Title 18 U.S. Code, a statement of the period of time for which the interception is required to be maintained.

3) Ga. Code Ann. Sec. 3004 does not provide, as does Section 2518 (5) Title 18 U.S. Code that no Order may authorize or approve the interception of wire or oral communications for a period of time longer than necessary to achieve the approved objective.

4) Ga. Code Ann. Sec. 26-3004 does not require each application for an Order, as does Section 2518 (1) (c) Title 18 U.S. Code, to include a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous. Nor does Ga. Code Ann. Sec. 3004 require, as does Section 2518 (3) (c) Title 18 U.S. Code, a finding to be made by the Court to like effect.

5) Ga. Code Ann. Sec. 26-3004 does not, as does Section 2518 (8) (d) U.S. Code require prompt post-search notice to those whose conversations have been intercepted.

6) Ga. Code Ann. Sec. 26-3004 does not require, as does Section 2518 (8) (d) Title 18 U.S. Code, that an inventory be filed within a reasonable time but not later than 90 (ninety) days after the filing of the application for an Order giving particulars as to (1) the fact of the entry of the Order, (2) the period of interception, and (3) whether actual interception took place.

7) Ga. Code Ann. Sec. 26-3004 does not require, as does Section 2518 (1) (e) Title 18 U.S. Code, a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept wire or oral communications involving any of the same persons, facilities or places specified in the applications and the actions taken by the judge on each such application.

8) Ga. Code Ann. Sec. 26-3004 does not require, as does Section 2518 (1) (f) Title 18 U.S. Code, where the application is for the extension of an Order, a

statement setting forth the results thus far obtained from the interception of a reasonable explanation for the failure to obtain such results.

The Applications requesting electronic surveillance and the interception of oral and wire communications of the Petitioner were insufficient under the Fourth and Fifth Amendments to the United States Constitution, Sections 2516, 2518 and 2519 Title 18 U.S. Code and Section 26-3004 Georgia Code Annotated:

1) The Affidavit of L. M. Smart does not contain a full and complete statement which would authorize a conclusion that other investigative procedures have been tried and failed, or why they reasonably appear unlikely to succeed if tried, or be too dangerous. His Affidavit is replete with conclusory assertions rather than facts such as Bobby James Lawson alias Bobby James Upton. Furthermore, such facts as are set out are untrue and do not support the conclusion that other investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or be too dangerous.

2) The Application did not contain a complete history of prior electronic surveillance of the persons named in the Application.

Omission of this information is a statutory violation that invalidates these interceptions, since such information about prior surveillance is necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs.

The Intercept Order was not executed in compliance with Section 2518, Title 18 U.S. Code and/or Section 26-3004 Georgia Code Annotated:

1) No periodic reports were filed with the Court whereby the Court could determine the need for continued surveillance or the propriety thereof.

2) No report was filed with the Court as to whose conversations were intercepted so that the Court could determine whether and who should be given prompt notice of the fact that their conversations had been intercepted.

The Intercept Order under which the communications were intercepted was facially insufficient:

1) The issuing Judge could not determine on the basis of facts submitted to him by the applicant that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or be too dangerous.

2) The Orders did not specify that the interception must automatically terminate when the described communication has been first obtained.

3) The Orders made no provision that reports were to be made to the issuing Judge showing what progress had been made toward achievement of the authorized objective and the need for continued interception.

4) The Order authorized a general search for twenty (20) days without any intervening judicial supervision.

Material allegations submitted in support of the applications for Orders authorizing oral and wire interceptions were conclusory and misleading.

Since the Order authorizing a search of Petitioner's premises was based on the exploitation of the primary illegality occurring during the electronic surveillance

and interception of outgoing communications from an extension to Petitioner's phone, the evidence seized during the execution of the search of Petitioner's premises was tainted fruit of the poisonous tree and is therefore inadmissible.

The affidavit by law enforcement officer in support of application for telephone intercept order contains no probable cause whatsoever insofar as Bobby Joe Upton is concerned. Through the use of Bobby James Lawson a/k/a or alias Bobby James Upton throughout the affidavit, application and intercept order make it appear that the information and surveillance applied to two male individuals, whereas in fact all material applied to one Bobby James Lawson and a female named Octavia Patricia Hall and a close reading of same will bear this out. All the physical surveillance had to do with a black maid, Estella Bush, Octavia Patricia Hall, and Bobby James Lawson. The laying off of numbers and bets on telephone number 461-1927 was with a female. What if anything is set forth in the affidavit, application and intercept order that relates to Bobby Joe Upton? Bobby Joe Upton and Bobby James Lawson are two separate persons. All recorded telephone intercepts involve outgoing alleged gambling communications from 461-1927 and none involve Bobby Joe Upton.

It is respectfully urged that Bobby Joe Upton was the subject of telephone intercept, search, indictment and conviction due to the fact that the name Bobby James Upton was attached or allegedly attached to Bobby James Lawson. See *U.S. vs Chavez,* 416 U.S. 562, 40 L. Ed. 2d 380, 94 S. Ct. 1849, *King vs U.S.* 282 Fed. 2d: 398 (1960), *U.S. ex rel Pugh vs Pate* 401 Fed. 2d 6 cert

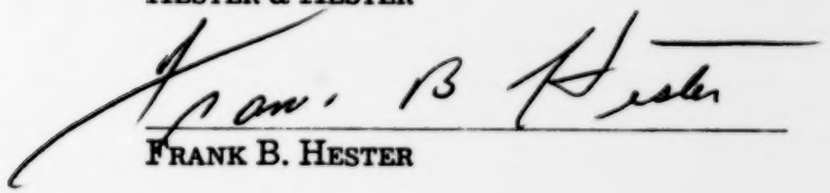
denied 394 U.S. 999 22 L. Ed 2d 777, 89 S. Ct. 1590, *U.S. vs Upshaw*, 448 Fed. 2d 1218.

CONCLUSION

It is respectfully urged that the decision and judgment of the Supreme Court of Georgia in not ruling Ga. Code Ann. Section 26-3004 unconstitutional, in not ruling the application of same to Petitioner was unconstitutional, and in not ruling that the telephone intercept was unlawful and all evidence thereunder including derivative evidence was inadmissable demands a Writ of Certiorari to the Supreme Court of Georgia issue.

Respectfully submitted

HESTER & HESTER



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APPENDIX

GEORGIA
FAYETTE COUNTY

AFFIDAVIT BY LAW ENFORCEMENT OFFICER
IN SUPPORT OF APPLICATION FOR
INVESTIGATIVE WARRANT

Personally, before the undersigned Officer authorized to administer oaths, comes L. M. Smart, who being first duly sworn on oath deposes and says, that he is a Special Agent with the Georgia Bureau of Investigation.

Deponent further says that he has been a member of the Georgia Bureau of Investigation for approximately three weeks and prior to that for five and one-half years was an Officer of the Atlanta Police Department, Atlanta, Georgia.

Deponent further shows: See Exhibit "A-1", which is made a part of this Exhibit "A".

Further, considering all the said circumstances, deponent has probable cause to believe that the said Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson and other unknown persons has committed and are committing the crime(s) of: Gambling and Conspiracy to Commit Gambling.

Deponent makes this Affidavit for the information of Ben J. Miller, District Attorney of the Griffin Judicial Circuit, to be annexed as an Exhibit to his Petition for an Investigation Warrant to intercept, overhear and record conversations between Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat John-

son, 109 LaFayette Drive, Riverdale, Fayette County, Georgia, telephone numbers: 461-3230 and 461-1927, and other unknown persons, because:

(a) other investigative procedures have been tried and failed;

(b) because of the secrecy with which said persons conduct such unlawful enterprises other investigative procedures reasonably appear to be unlikely to succeed.

L. M. SMART

L. M. Smart
Special Agent, G.B.I.

Sworn to and subscribed before me
this 23rd day of September, 1974.

ANDREW J. WHALEN, JR.

JUDGE, Fayette Superior Court
Griffin Judicial Circuit

EXHIBIT "A-1"

AFFIDAVIT OF L. M. SMART TO SUPPORT APPLICATION FOR ELECTRONIC SURVEILLANCE WARRANT, FAYETTE SUPERIOR COURT, GRIFFIN JUDICIAL CIRCUIT, TELEPHONE NUMBERS 461-3230 and 461-1927.

I. QUALIFICATION OF AFFIANT

Affiant has been an Agent of the Georgia Bureau of Investigation for the past three weeks and has been assigned to the Organized Crime Unit. For the previous 5 1/2 years, Affiant was a member of the Atlanta Police Department, where he was assigned to the Uniform Division for three years and to the Gambling Squad of the Vice Control Division for the remaining 2 1/2 years. During this 2 1/2 year period, Agent Smart was responsible for numerous arrest and convictions of known lottery and bookmaking gamblers.

II. INFORMATION FROM CONFIDENTIAL INFORMANT

On Tuesday, September 10, 1974, Agent L. M. Smart talked with a confidential and reliable informant, whose information in the recent past has led to the arrests of numerous persons for lottery and bookmaking gambling violations. The information which this informant has given to Agent Smart has resulted in the arrests of Earl Hampton, Ellis Ayers, and Albert Safarty, bookmaking-lottery operation in Douglas County during the month of December, 1973. Informant also furnished information which resulted in the arrests of the Joseph Johnson, Jr. lottery operation during the month of April, 1974.

Informant also furnished information which resulted in the arrest of the Alice Mae Grier, Richard A. Phillips, Jr. and Mary Nell Fuguson lottery operation during the month of May, 1974. These cases are still pending in the Courts. Informant stated to Agent Smart that Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson are conducting a lottery operation in the metro Atlanta area, utilizing telephone numbers 461-3230 and 461-1927.

On September 10, 1974, informant stated to affiant that Bobby James Lawson a/k/a Bobby James Upton makes the pickup of numbers and bets every Tuesday night from informant's residence. Informant states that on August 27, September 3, September 10, September 17, 1974, Bobby James Lawson a/k/a Bobby James Upton, made pickups from informant's residence. These pickups consisted of collecting the records of bets, money, and paying off "hit" numbers. Informant further states that he has been and is presently working for the Bobby James Lawson a/k/a Bobby James Upton Lottery operation. The last date that affiant talked with informant was on the 20th day of September, 1974, where on that date informant told affiant that Bobby James Lawson a/k/a Bobby James Upton was still operating the lottery and has several females working in the headquarters.

AJW—

Informant states that during the days that the lottery is in operation, he will call telephone numbers 461-3230 or 461-1927 and "lay off" the numbers and bets which he has collected for that day. Informant also stated that Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson are operating this lottery from either Clayton or Fayette County, Informant stated the lottery, commonly known as the "numbers racket", is the placing of a bet or bets on a three digit number that is obtained from the total number of stocks and the total of bond on the New York Stock Exchange. This number is obtained by taking the one-hundred-thousand digit and the ten-thousand digit of the total number of bonds and the ten-thousand digit of the total numbers of stocks respectfully. Informant states that a player may place any amount of money on any three digit and if he "hits", the winning number, then the banker will pay off at the rate of 400 to one. However, if the player "boxes", the number, which means the number can be in any combination of the three digits, then the banker will pay off at the rate of 400 to one on one-sixth the amount bet. A writer of the lottery is the person who receives and records numbers and bets for the purpose of the lottery. The writer takes 25% of his daily take and 10% of a "hit" for his salary. The writer will then give to a "drag man" the numbers and the money. The "drag man" will then transport the numbers and the money to the headquarters. The headquarters will check the numbers and determine if their is a "hit". If there is, then the pay off money is channeled back down to the player. The "banker" will be located at the headquarters. The banker is the person who is financing the

lottery operation. Informant further states that in this lottery operation the headquarters will call each writer or the writer will call the headquarters and transmit the numbers and bets to Pat Hall aka Pat Johnson before the "drag man" picks them up. Informant also states that Patricia Hall aka Pat Johnson and Bobby James Lawson aka Bobby J. Upton operates the lottery headquarters for this lottery operation.

Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson are known gamblers to Agent Smart and both subjects have an arrest record for violation of the Georgia Gambling Laws. The private listings for telephone numbers 461-3230 and 461-1927 were obtained by Agent Smart by obtaining a Court Order from Judge Andrew J. Whalen of the Griffin Judicial Circuit. This Court Order dated September 20, 1974, authorized Southern Bell Company to release this information. Telephone numbers 461-3230 and 461-1927 are listed to Bobby James Upton, 109 LaFayette Drive, Riverdale, Fayette County, Georgia. Bobby James Upton is a known alias to Agent Smart for Bobby James Lawson.

III. PHYSICAL SURVEILLANCE

A physical surveillance was maintained by Affiant and other members of the Georgia Bureau of Investigation and Detective R. C. McClendon of the Atlanta Police Department between September 7, 1974 and September 21, 1974. The results of the surveillance are as follows:

On September 7, 1974, at approximately 12:10 p.m., Affiant observed a white Mark IV Lincoln parked in

the driveway of 107 LaFayette Drive, Riverdale, Fayette County, Georgia. This Mark IV Lincoln was bearing a dealers tag, numerals unknown. Also, parked in the driveway was a two-tone brown 1974 Chevy, bearing Georgia license plate RZG-414. This tag is registered to Estella Bush, 1089 Neal Place, Apartment #3, Atlanta, Georgia. This vehicle was being driven by a black female in her late twenties. The white Mark IV Lincoln is known to Agent Smart to be driven by Pat Hall aka Pat Johnson and Bobby James Lawson aka Bobby James Upton, through previous investigations.

On September 9, 1974, at approximately 10:15 a.m., Affiant and Agent Clyde Heard, Jr. observed a black female drive a two-tone brown 1974 Chevrolet, bearing Georgia license plate RZG-414, parked in the driveway of 107 LaFayette Drive, Riverdale, Fayette County, Georgia. At approximately 5:00 p.m., Agent Heard observed the 1974 Chevrolet parked in the rear of 1089 Neal Place, Apartment #3, Atlanta, Georgia.

On September 10, 1974, at approximately 8:40 a.m., Agent Heard observed the 1974 Chevrolet parked in the rear of 1089 Neal Place, Apartment #3, Atlanta, Georgia. At approximately 9:30 a.m., a black female left 1089 Neal Place, Apartment #3, Atlanta Georgia. The black female drove to Alfonzo Herndon School, where she stayed for approximately five minutes. At approximately 10:15 a.m., the Chevrolet pulled into the driveway of 107 LaFayette Drive, Riverdale, Fayette County, Georgia. This is the residence of Patricia Hall aka Pat Johnson. Also, on this date, Agent Heard procured from the Georgia Department of Public Safety,

Drivers License Division, a recent photograph of Estella Bush. Agent Heard identified this photograph as being the same as the driver of the 1974 Chevrolet. At approximately 8:30 a.m., Agent Smart observed Pat Hall aka Pat Johnson driving the white Mark IV Lincoln pulling into the driveway of 107 LaFayette Drive, Riverdale, Fayette County, Georgia. Also, on this date, Agent Smart's confidential and reliable informant dialed telephone number 461-1927, while Agent Smart observed. The informant then "laid off" numbers and bets to a white female named "Pat". This was done while Agent Smart listened in on an extension, and with the full knowledge and consent of the informant. Agent Smart recognized the voice of the white female identified as "Pat" as being Pat Hall aka Pat Johnson.

On September 11, 1974, Affiant observed a bronze Monte Carlo parked in the driveway of 107 LaFayette Drive, Riverdale, Fayette County, Georgia. The white Mark IV Lincoln was gone. At 10:15 a.m., the 1974 Caprice arrived at 107 LaFayette Drive, Riverdale, Fayette County, Georgia, being driven by Estella Bush. Also, on this date, Agent Heard followed the 1974 Chevrolet from 1089 Neal Place, Apartment #3, Atlanta, Georgia to 107 LaFayette Drive, Riverdale, Fayette County, Georgia.

On September 13, 1974, Affiant and Agent Heard followed the 1974 Chevrolet from 1089 Neal Place, Apartment #3, Atlanta, Georgia to 107 LaFayette Drive, Riverdale, Fayette County, Georgia.

On September 15, 1974, Affiant observed Bobby James Lawson aka Bobby James Upton leaving 107 LaFayette Drive, Riverdale, Fayette County, Georgia,

in the white Mark IV Lincoln. Subject Lawson then traveled North on Georgia Highway #314.

On September 16, 1974, Affiant and Agent Heard followed the 1974 Chevrolet from 1089 Neal Place, Apartment #3, Atlanta, Georgia to 107 LaFayette Drive, Riverdale, Fayette County, Georgia.

On September 17, 1974, at approximately 9:40 a.m., Affiant observed Bobby James Lawson aka Bobby James Upton driving a dark blue with white stripes 1974 El Camino, bearing Georgia license plate CE-8178. This vehicle was seen pulling onto Georgia Highway #314. Tag #CE-8178 is registered to Piedmont Truck Rental and Leasing Company, Villa Rica, Georgia.

On September 18, 1974, Affiant, Agent Meeks and Detective R. C. McClendon of the Atlanta Police Department conducted a physical surveillance on 107 and 109 LaFayette Drive, Riverdale, Fayette County, Georgia. At approximately 9:20 a.m., Bobby James Lawson aka Bobby James Upton left 107 LaFayette Drive, Riverdale, Fayette County, Georgia, driving the white Mark IV Lincoln. Lawson traveled to the Elementary School on Lee Street in Fayetteville and discharged several small children. Lawson then traveled to the Hood Street Elementary School, where he discharged another small child. Lawson then returned to 107 LaFayette Drive, Riverdale, Fayette County, Georgia. At approximately 10:00 a.m., Bobby James Lawson aka Bobby James Upton left 109 LaFayette Drive, Riverdale, Fayette County, Georgia, driving the dark blue 1974 El Camino, bearing Georgia license plate CE-8178. Lawson traveled to 7456 Grayson Drive, which is the residence of C. L. Doss, and stayed for approximately

five minutes. This residence is located in Riverdale, Clayton County, Georgia. Next, Lawson traveled to the wholesale section of the State Farmers Market, where he made five stops. At one of the stops Affiant and Agent Meeks observed Lawson stop his vehicle and walk up to a white male, wearing a green shirt and hand him a small object. The white male placed this object in his shirt pocket and Lawson returned to his vehicle and departed. Lawson then traveled to Jonesboro Road, where he stopped at the Ma-Jik Market across from Treasure Island and stayed for approximately five minutes, this is located within Atlanta, Fulton County, Georgia. Lawson then traveled to Line Street off of Glenwood Road, DeKalb County, Georgia, where he stopped and talked with several phone men, employed by Southern Bell Telephone Company, for approximately fifteen minutes. Lawson then traveled to Buck's Lounge located in the Columbia Villege Shopping Center, on Columbia Drive at Glenwood Road, DeKalb County, Georgia.

Also, on this date, Affiant's confidential and reliable informant dialed telephone number 461-1927, while Affiant watched. Informant then "laid off" numbers and and bets to a white female identified as "Pat", while Affiant listened in on an extension. This was done with the full knowledge and consent of the informant.

On September 19, 1974, Affiant Agent Meeks and Detective R. C. McClendon of the Atlanta Police Department conducted a physical surveillance on 107 and 109 LaFayette Drive, Riverdale, Fayette County, Georgia. At approximately 8:35 a.m., Patricia Hall aka Pat Johnson left 107 LaFayette Drive, Riverdale, Fayette

County, Georgia, in the white Mark IV Lincoln and traveled to the Elementary School on Lee Street, Fayetteville, Fayette County, Georgia, where she discharged several small children. Hall then traveled to the Elementary School on Hood Street, Fayetteville Fayette County, Georgia, where she discharged a small child. Hall then returned to 107 LaFayette Drive, Riverdale, Fayette County, Georgia. At approximately 10:00 a.m., Estella Bush arrived at 107 LaFayette Drive Riverdale, Fayette County, Georgia, driving a 1974 Chevrolet. Also, on this date, Affiant's confidential and reliable informant dialed telephone number 461-1927, while Affiant watched. Informant then "Laid off" numbers and bets to a white female identified as "Pat", while Affiant listened in on an extension. This was done with the full knowledge and consent of the informant.

On September 20, 1974, Affiant's confidential and reliable informant dialed telephone number 461-1927, while Affiant watched. Informant then "laid Off" numbers and bets to a white female identified as "Pat", while Affiant listened in on an extension. This was done with the full knowledge and consent of the informant.

Based on the physical surveillance, informant's telephone calls, and Affiant's previous experience, it is Affiant's opinion that 109 LaFayette Drive, Riverdale, Fayette County, Georgia and telephone numbers 461-3230 and 461-1927 are being utilized as headquarters for receiving and recording numbers and bets for the purpose of operating a lottery.

IV. NORMAL INVESTIGATIVE PROCEDURES

Affiant is of the opinion that normal investigative procedures in this case would not be successful for the following reasons: Lottery betting involves a hierarchy consisting of different individuals of different ranks and status in the organization. It is a conspiratorial type organization. Many individuals are involved to varying degrees. The subjects whose telephones were subject to surveillance, Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson are merely two individuals in the total hierarchy in the lottery organization. Affiant also knows from his past experience in working lottery gambling cases that, in many instances, the records obtained over the telephone are the only records that indicate the tying in with the individual whose telephone is being tapped and his superiors and/or counterparts in the lottery organization. The purpose of this electronic surveillance is to determine to what extent and scope the individual whose telephone is being surveilled is involved in the lottery organization. It is my experience, based on lottery investigations, which I have conducted in the past that the full extent of the conspiracy cannot be obtained by normal investigative techniques. The degree of involvement of subject Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson, the co-conspirators, the other individuals of various degree of criminal involvement in the lottery organization cannot be determined without this electronic surveillance. Through my personal experience and the experience of other Special Agents in the Georgia Bureau of Investigation, who have worked gambling cases, I also know that the records seized in gambling

raids generally have not been sufficient to establish the total hierarchy of the organization, but only serve to indicate the one, or at the maximum, a few individuals' participation in the lottery scheme. The confidential informant referred to in this Affidavit is unwilling and afraid to testify since he is in fear of his personal safety if he does testify.

Surveillance, as indicated previously, has been conducted but been unable to furnish sufficient evidence to prosecute and connect all individuals who are involved in this lottery organization. Informant has told Affiant, who has previously stated in the Affidavit that subjects Bobby James Lawson aka Bobby James Upton and Patricia Hall aka Pat Johnson are operating a lottery organization and that they are not the only two individuals that are involved in the lottery operation. This indicates there are other individuals who are involved in this lottery operation. One of the purposes of this investigation is to root out those who were ultimately responsible for setting up, operating, and maintaining this lottery organization. The only way to locate these individuals is through the use of electronic surveillance and, at the same time, the individuals whose telephone is being surveilled, their total involvement in the illegal lottery operation will be discovered.

L. M. SMART

L. M. Smart, Special Agent
Georgia Bureau of Investigation

GEORGIA
FAYETTE COUNTY

TO THE SUPERIOR COURT OF SAID COUNTY AND TO THE HONORABLE ANDREW J. WHALEN, JUDGE OF SAID COURT:

The petition of Ben J. Miller as District Attorney of the Griffin Judicial Circuit respectfully shows:

1.

Petitioner has probable cause to believe, upon the basis of facts and circumstances which have come into Petitioner's possession from trustworth informational sources, and accordingly avers upon information and belief that Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson and other unknown persons (have committed) and (are committing) the crime(s) of: Gambling and Conspiracy to Commit Gambing in violation of the Georgia Penal Laws:

2.

The basis of probable cause referred to in paragraph one hereof are the facts and circumstances set out in L. M. Smart's Affidavit annexed and made a part of this petition as Exhibit "A". Mr. Smart being a Special Agent of the Georgia Bereau of Investigation. Petitioner shows that he has been informed of the facts and circumstances set out in Exhibit "A" by the person who executed that Affidavit. Petitioner further avers that he has been personally acquainted with M. L. Carothers for approximately five years, who in turn has known Special Agent L. M. Smart for four years. Petitioner further avers that he has

personal knowledge as to the general character of the members of the Georgia Bureau of Investigation and believes said facts and circumstances are true. Petitioner shows that he has no information inconsistent with the facts and circumstances set out by Special Agent L. M. Smart and that he believes said facts and circumstances set forth therein to be true.

Petitioner avers that an Order to conduct a surveillance of the said Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson, telephone numbers 461-3230 and 461-1927 and other unknown persons to secure evidence and information with the view to prosecution of either of said persons who has committed and are committing said offense(s) as set out in Exhibit "A", which is incorporated by reference herein, it is necessary that Petitioner use and employ certain herein-after described devices, instruments, and apparatus, to-wit:

The telephone interception will be physically located on the telephone cable or terminal box of telephone numbers 461-3230 and 461-1927, located at 109 LaFayette Drive, Riverdale, Fayette County, Georgia, and utilized by Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson for said discussions and conversations the following devices, instruments and apparatus: a direct connection to said telephone lines, at any point between said telephones and the point of origin of said telephone lines from the telephone company terminal, by a wire to a remotely located automatic autuating device, digital number recorder, controlling a tape recorder at the remote location. Said devices to be activated and begin monitoring

whenever the said telephones or their extensions are removed from their cradles, and to automatically cease monitoring upon the return of said telephones or their extensions to said cradles.

Petitioner avers that an Order to conduct such surveillance is necessary because:

(a) other investigative procedures have been tried and failed;

(b) because of the secrecy with which said persons conduct such unlawful enterprises other investigative procedures reasonably appear to be unlikely to succeed.

See Exhibit "A" and "A-1" for details on other Investigative procedures.

Petitioner avers that he has knowledge of a previous application made to Judge Harold Banke of the Clayton Judical Circuit which was signed on the 11th day of April, 1972, which authorized the interception of wire or oral communications involving Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson at 3931 Scott Drive, Forest Park, Clayton County, Georgia, telephone numbers 361-5622 and 361-7748.

4.

Petitioner specifies as the discussions and conversations to be overheard and recorded, as all discussions and conversations between Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson and other unknown persons relating to the commission of the above-mentioned crimes, and as set out in Exhibit "A"

hereof, which is attached hereto and incorporated by reference herein. The conversations to be intercepted are those relating to the above said offense(s).

5.

Petitioner avers, basing this averment upon the facts and circumstances setforth in this Petition and the Exhibit annexed, that if notice of surveillance by the use and employment of said devices, instruments and apparatus is given to the said Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson and the other unknown persons they will refrain from discussing the aforesaid violations of the gambling laws of the State of Georgia with said other unknown persons and may flee and conceal themselves to avoid detection and arrest and that the exigencies of the situation overcome and override the need for giving notice of surveillance to the said Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson and other unknown person.

WHEREFORE, Petitioner prays that an Investigation Warrant issue as provided in Section 26-3004, Georgia Criminal Code, authorizing Petitioner to conduct a surveillance of said Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson, telephone numbers 461-3230 and 461-1927 and other unknown persons through the use of said devices, instruments and apparatus, which surveillance shall begin at 12:01 o'clock p.m. on the 24th day of September, 1974, and in any event shall cease at 12:00 o'clock noon p.m. on the 14th day of October, 1974. Since said offenses, discussions and conversations are considered by petitioner to be of a continuing nature because of the facts and cir-

cumstances set out in the Affidavit and Petition and will continue throughout the period of the surveillance, petitioner prays that said surveillance shall not cease immediately upon the seizure of the first conversations and discussions relative to said offenses, but shall continue for the entire authorized 20 day period, until all such conversations and discussions between said parties relative to the offenses herein enumerated are seized, at which point said surveillance shall terminate forthwith.

BEN J. MILLER

Ben J. Miller, DISTRICT ATTORNEY
GRIFFIN JUDICIAL CIRCUIT

Sworn to and subscribed before me
this 23rd day of September, 1974.

SHIRLEY M. JOHNSON

Notary Public

**EX PARTE, BEN J. MILLER,
DISTRICT ATTORNEY,
GRIFFIN JUDICIAL CIRCUIT**

INVESTIGATION WARRANT

Upon consideration of the Petition under oath of Ben J. Miller as District Attorney of the Griffin Judicial Circuit, and other evidence adduced before me in support of the allegations thereof, I find that the petitioner has been informed of such facts and circumstances by reasonably trustworthy informational sources sufficient to lead a man of reasonable caution to believe that the crimes(s) of: Gambling and Conspiracy to Commit Gambling has been committed as alleged in the Petition, and on the basis of the facts set forth in the Petition, I find that:

(a) there is probable cause for belief that the individuals named in Petition have committed and are committing said offenses:

(b) there is probable cause for belief that particular communications concerning said offense will be obtained through the interception for which warrant is prayed;

(c) normal investigative procedures have failed and appear unlikely to succeed if tried further;

(d) there is probable cause for belief that the facilities from which the wire or oral communications are to be intercepted are being used, or are about to be used in connection with the commission of said offenses, are listed in the name of or commonly used by the individuals named in the Petition; and

(e) probable cause has been shown for the issuance of an Investigative Warrant as prayed.

I find that the Petition and supporting Affidavit set forth show such exigencies as to overcome and override the need for giving notice of surveillance under this Warrant to the parties to be overheard, and it is adjudged that no notice of the issuance of this Warrant or of any actings and doings connected with its execution shall be given to any person, other than as authorized by law.

Pursuant to the provisions of 18 U.S.C. Section 2518 and Section 26-3004, Georgia Criminal Code, the said District Attorney, and law enforcement officers and agents under his direction and control permanently or temporarily, are hereby authorized to conduct a surveillance of Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson, 109 LaFayette Drive, Riverdale, Fayette County, Georgia, telephone numbers 461-3230 and 461-1927 and other unknown persons relating to the crime(s) of: Gambling and Conspiracy to Commit Gambling by either of said persons or any other persons.

Said surveillance shall begin at 12:01 o'clock p.m. on the 24th day of September, 1974; and, in any event shall cease at 12:00 (noon) o'clock p.m. the 14th day of October, 1974.

Since said offenses, discussions and conversations are determined by the Court to be of a continuing nature because of the facts and circumstances set out in the Affidavit and Petition attached hereto, and incorporated by reference herein, and will continue throughout the period of the surveillance, said surveillance shall not cease immediately upon the seizure of the first conversations and discussions relative to said offenses, but shall continue for the entire authorized 20 day period, until all such conversations and discussions between said parties are seized, at which point said surveillance shall terminate forthwith.

The said District Attorney, law enforcement officers and agents in the execution of this Warrant are authorized to place, locate and use the following devices, instruments and apparatus: The telephone interception will be physically located on the telephone cable or terminal box of telephone numbers 461-3230 and 461-1927, located at 109 LaFayette Drive, Riverdale, Fayette County, Georgia, and utilized by Bobby James Lawson alias Bobby James Upton and Patricia Hall alias Pat Johnson for said discussions and conversations, the following devices, instruments and apparatus: a direct connection to said telephone lines, at any point between said telephones and the point of origin of said telephone lines from the telephone company terminal, by a wire to a remotely located automatic actuating device, digital number recorder, controlling a tape recorder at the remote location. Said devices to be activated and begin monitoring whenever the said telephones or their extensions are removed from their cradles, and to automatically cease monitoring upon the return of said telephones or their extensions to said cradles. Provided, however, said devices shall be continuously monitored by said authorized personnel; and said personnel shall neither intercept nor record any conversations and discussions except those herein authorized, except to the

extent required to eliminate from this surveillance such conversations and discussions.

No person other than said District Attorney of the Griffin Judicial Circuit or a law enforcement officer or agent under his direction and control permanently or temporarily shall in any manner participate in the employment of the devices, instruments and apparatus used in the execution of the devices, instruments and apparatus used in the execution of this Warrant, and said District Attorney, law enforcement officers and agents are forbidden to record any conversation or discussions which are personal and private in nature or not specified in this Warrant. This Warrant shall be executed as soon as practicable.

The Southern Bell Telephone Company is directed to furnish the applicant or his authorized agent, forthwith such technical assistance as is necessary to accomplish the interception unobtrusively and with minimum of interference with services that the Southern Bell Telephone Company is according to person or persons whose communications are to be intercepted.

Let return hereof and report as required by law be made before me within thirty days of the date hereof.

This the 23rd day of September, 1974.

ANDREW J. WHALEN, JR.
JUDGE, FAYETTE SUPERIOR COURT
GRIFFIN JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FAYETTE COUNTY
GRIFFIN JUDICIAL CIRCUIT

STATE OF GEORGIA	INDICTMENT NO.
- vs -	3-75-166
BOBBY J. LAWSON, ET AL	3-75-167

MOTION TO SUPPRESS

COME NOW the Defendants above-named, prior to trail, by their Attorney, Herbert Shafer, and move this Honourable Court to suppress the contents of any intercepted wire or oral communications of the Defendants, or any evidence discovered, learned, traced or in any manner derived therefrom, including the names or testimony of any witnesses discovered as a result thereof; and including any physical evidence obtained as the result of a search warrant issued subsequent to the interception of Defendants' conversations and/or flowing therefrom in whole or in part; and that an Order issue directing the return of any physical evidence seized as afore-said and the return of all the transcriptions and recordings of said communications, including copies; and that an Order issue suppressing all of such evidence as afore-said and prohibiting its use, directly or indirectly, in any trial hearing or other proceeding (except insofar as such evidence may be required in furtherance of this Motion) on the grounds that:

I

Since Chapter 26-30 Ga. Code Annotated does not conform to Title III of the Omnibus Crime Control Act of 1968, Sections 2510-2520 inclusive, Title 18 U.S. Code, it is facially insufficient and hence provides no legitimation of the interceptions herein.

1) Chapter 26-30 makes no provision, as does Section 2518 (6) Title 18 U.S. Code for the making of reports to the Judge who issued the Order showing what progress has been made toward achieving the authorized objective and the need for continued interception.

2) Chapter 26-30 does not require the inclusion in each application, as does Section 2518 (1) (d) of Title 18 U.S. Code, a statement of the period of time for which the interception is required to be maintained.

3) Chapter 26-30 does not provide, as does Section 2518 (5) Title 18 U.S. Code that no Order may authorize or approve the interception of wire or oral communications for a period of time longer than necessary to achieve the approved objective.

4) Chapter 26-30 does not require each application for an Order, as does Section 2518 (1) (c) Title 18 U.S. Code, to include a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous. Nor does Chapter 26-30 require, as does Section 2518 (3) (c) Title 18 U.S. Code, a finding to be made by the Court to like effect.

5) Chapter 26-30 does not, as does Section 2518 (8) (d) U.S. Code require prompt post-search notice to those whose conversations have been intercepted.

6) Chapter 26-30 does not require, as does Section 2518 (8) (d) Title 18 U.S. Code, that an inventory be filed within a reasonable time but not later than 90 (ninety) days after the filing of the application for an Order giving particulars as to (1) the fact of the entry

of the Order, (2) the period of interception, and (3) whether actual interception took place.

7) Chapter 26-30 does not require, as does Section 2518 (1) (e) Title 18 U.S. Code, a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept wire or oral communications involving any of the same persons, facilities or places specified in the applications and the actions taken by the judge on each such application.

8) Chapter 26-30 does not require, as does Section 2518 (1) (f) Title 18 U.S. Code, where the application is for the extension of an Order, a statement setting forth the results thus far obtained from the interception or a reasonable explanation for the failure to obtain such results.

II

The Applications requesting electronic surveillance and the interception of oral and wire communications of the Defendants were insufficient under the Fourth and Fifth Amendments to the United States Constitution, Sections 2516, 2518 and 2519 Title 18 U.S. Code and Section 26-3004 Georgia Code Annotated:

1) The Affidavit of L. M. Smart does not contain a full and complete statement which would authorize a conclusion that other investigative procedures have been tried and failed, or why they reasonably appear unlikely to succeed if tried, or be too dangerous. His Affidavit is replete with conclusory assertions rather than facts. Furthermore, such facts as are set out are un-

true and do not support the conclusion that other investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or be too dangerous.

2) The Application did not contain a complete history of prior electronic surveillance of the persons named in the Application. Omission of this information is a statutory violation that invalidates these interceptions, since such information about prior surveillance is necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs.

III

The Orders of Authorization or Approval were not executed in compliance with Section 2518, Title 18 U.S. Code and/or Section 26-3004 Georgia Code Annotated:

1) No periodic reports were filed with the Court whereby the Court could determine the need for continued surveillance or the propriety thereof.

2) No report was filed with the Court as to whose conversations were intercepted so that the Court could determine whether and who should be given prompt notice of the fact that their conversations had been intercepted.

3) Upon information and belief, unauthorized personnel participated in the monitoring of the Defendants' conversations.

4) Upon information and belief the minimization requirements were flouted.

IV

The Orders of Authorization or Approval under which the communications were intercepted are facially insufficient:

1) The issuing Judge could not determine on the basis of facts submitted to him by the applicant that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or be too dangerous.

2) The Orders did not specify that the interception must automatically terminate when the described communication has been first obtained.

3) The Orders made no provision that reports were to be made to the issuing Judge showing what progress had been made toward achievement of the authorized objective and the need for continued interception.

4) The Order authorized a general search for twenty (20) days without any intervening judicial supervision.

V

Material allegations submitted in support of the applications for Orders authorizing oral and wire interceptions were conclusory and misleading.

VI

Since the Orders authorizing a search of Defendants' premises and persons were based on the exploitation of the primary illegality occuring during the electronic surveillance and interception of Defendants' oral communications, the evidence seized during the execution of the search of Defendants' premises and persons is tainted fruit of the poisonous tree and is therefore inadmissible.

WHEREFORE, the Defendants' respectfully pray:

1) That this, their Motion, be in all respects granted and that the things set forth herein be suppressed together with any evidence or leads discovered, learned, traced or in any manner derived therefrom.

2) That an Order issue mandating the return to the Defendants of all tapes, transcriptions and recordings of said communications, including copies, and that any evidence or leads discovered, learned, traced or in any manner derived therefrom not be used in any trial, hearing or other proceding (except insofar as is in furtherance of this Motion to Suppress).

3) That because of the complex legal and factual issues involved herein and in furtherance of the orderly administration of criminal justice that the Defendants be afforded a Pre-Trial Evidentiary Hearing in order to divulge the facts herein.

4) That at said Pre-Trial Evidentiary Hearing the State produce for examination the following:

(a) Hon. Andrew J. Whalen

(b) Hon. Ben J. Miller

(c) Special Agent L. M. Smart

(d) Any and all Law Enforcement Officers who executed the Order of authorization or approval by monitoring and recording the conversations intercepted on Telephone Numbers: 461-3230 & 461-1927.

(e) All Police Officials, city, state and county who participated in the search of Defendants' premises.

5) For such other and further relief as to the Court will seem just and proper in the premises.

The Defendants have been aggrieved by the electronic surveillance, searches and seizures conducted herein and hence have standing within the perview of Section 27-313 Georgia Code Annotated and Title 18 Sections 2515, 2518 (a) and (10) U.S. Code.

HERBERT SHAFER

HERBERT SHAFER
Attorney for Defendants

620 Peachtree Street, N.E.
Mezzanine Level
Atlanta, Georgia 30308

Tel: (404) 881-0607

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1975, served a copy of the foregoing Motion to Suppress upon the Hon. Ben J. Miller, District Attorney, Superior Court of Fayette County, Griffin Judicial Circuit, by placing a copy thereof thus addressed in a postage paid envelope.

HERBERT SHAFER

HERBERT SHAFER
Attorney for Defendants

620 Peachtree Street, N.E.
Mezzanine Level
Atlanta, Georgia 30308

Tel: (404) 881-0607

IN THE SUPERIOR COURT OF FAYETTE COUNTY GRIFFIN JUDICIAL CIRCUIT

STATE OF GEORGIA
- vs -
BOBBY J. LAWSON, ET AL

INDICTMENT NO.
ORDER

An Application having been made in behalf of the Defendants herein, and said Application having been read and considered:

NOW THEREFORE it is Ordered:

That the Hon. Ben J. Miller be served with a copy of said Application and this Order and let the State show cause before the Hon. J. C. Jackson on the 10th day of March, 1975, at 1:30 o'clock p.m., or as soon thereafter as Counsel can be heard, why the relief prayed for by the Defendants should not, in all respects, be granted.

Let service of a copy of Defendants' Application and a copy of this Order upon the Hon. Ben J. Miller, District Attorney within ..... days from this date be deemed good and sufficient service.

This the 10th day of March, 1975.

ANDREW J. WHALEN, JR.
Judge, Superior Court of
Fayette County

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Supreme Court of Georgia Decided: Apr. 20, 1976

30939. LAWSON et al. v. THE STATE

UNDERCOFLER, Presiding Justice.

Appellants were convicted in a non-jury trial on two counts of communicating gambling information. Each appellant was sentenced to two five-years terms to run concurrently. Certain evidence was obtained under a telephone intercept order. This appeal asserts that the trial court erred in refusing to suppress all evidence derived from the telephone intercept order, the admission of certain evidence, and the denial of appellants' motions for directed verdicts. The appeal attacks also the constitutionality of Ga. L. 1968, pp. 1249, 1328 as amended, Ga. L. 1972, p. 615, and Ga. L. 1972, pp. 952, 953 (Code Ann. §26-3004) because it fails to meet the requirements set out by the United States Congress in 18 USC §§ 2510-2520.

The telephone intercept order was issued on September 23, 1974, by a judge of the superior court upon the affidavit of an agent of the Georgia Bureau of Investigation. The order authorized the interception of communications over two telephones for a 20 day period. The wiretap began on September 24, 1974, and terminated on September 26, 1974. Thereafter the judge issued two search warrants based upon the intercepted communications. HELD:

1. Appeallants contend the intercepted communications should have been suppressed because the State failed to comply with the "necessity" requirements of

18 USC § 2518 (1) (c) and § 2518 (3) (c). These sections provide respectively that an application for an order authorizing a telephone interception shall include, "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," and, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Appellants argue that the statements in the GBI agent's affidavit as to necessity are stereotyped recitals and fail to satisfy the statute. *We do not agree.* The affidavit shows in detail a physical surveillance of the purported gambling establishment and of the defendants over a period of two weeks prior to the issuance of the telephone intercept order. The affiant shows from prior experience that the full extent of an illegal gambling operation as here, and the individuals involvement therein cannot be obtained by normal investigative techniques. In our opinion the trial court was authorized to rely upon these representations. As stated in *United States v. Robertson,* 504 F2d 289, 293 (3), "We first note that §§ 2518 (1)(c) and (3)(c) must be read in a common sense fashion. They are 'simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.' *United States v. Kahn,* 1974, 415 U. S. 143, 153 n. 12, 94 SC 977, 983 n. 12, 39 LE2d 225, 236 n. 12. Their purpose 'is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use

of conventional techniques.' *United States v. Pacheco,* 5th Cir. 1974, 489 F2d 554. The provisions contemplate that 'the showing be tested in a practical and commonsense fashion.' "

2. Appeallants contend there was an unauthorized publication and disclosure of the contents of the communications obtained under the intercept order. It argues that duplicated tapes of the intercept conversations were made in apparent disregard of the judge's order that such communications and the tapes thereof were to be kept confidential and delivered to the clerk of the court. We find no error. The record shows that the judge who issued the telephone intercept order approved the making of duplicate tapes and transcripts thereof in order to comply with Federal and State laws. See 18 USC § 2517 (1) and (2). The duplicate tapes were given to a secretary to transcribe. The duplicate tapes were then erased and the tapes delivered to the judge who issued the intercept order. The judge kept them in his personal possession until the hearing on the motion to suppress when they were delivered to the district attorney.

3. In our opinion the evidence shows that the officers conducting the telephone interceptions did so in such a way as to minimize the interception of communications not subject to the order. The record shows the interceptions were terminated on a number of personal and nonrelevant conversations. The interceptions were authorized for a 20 day period, however, they were terminated after two days.

4. The failure to advise the judge issuing the telephone intercept order of a previous interception in

October 1973 was harmless. The judge was informed of previous telephone intercepts but not specifically this particular one.

5. We find no merit in appellants' contentions that the affidavit in support of the issuance of the telephone intercept order contained false material representations. These contentions involve the credibility of witnesses and the decision of the trial judge will not be reversed.

6. Appellants content that Code Ann. § 26-3004 is unconstitutional because it does not meet the minimum standards of Title III of the Omnibus Crime Control Act of 1968 (18 USC § 2510, et seq.). Appellants argue that Code Ann. § 26-3004 omits the provision of 18 USC § 2518 (6) which states: "Whenever an order authorizing interception is entered pursuant to this chapter the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require." This provision is discretionary and not mandatory. The fact that it is not included in the Georgia statute does not render it unconstitutional or in conflict with the federal provision.

7. Appellants have no standing to challenge the Georgia statute because it does not provide that the application for an intercept order contain a statement as to the period of time the interception is required to be maintained, that it must not be longer than necessary to achieve the objective, that other investigative procedures have failed, that the judge make a

finding that other investigative procedures have failed, and require that the person named in the intercept order be given reasonable notice thereof after the surveillance. All of these requirements were complied with and the appellants show no harm.

8. The trial court did not err in denying appellants' motion for directed verdicts.

9. Evidence that a particular phone was registered to one of the appellants was admissible. Code Ann. § 38-711.

10. During the hearing on the motion to suppress appellant Hall admitted to being a lottery operator. She claims this testimony was necessary to support her motion to suppress. During the trial upon motion by the district attorney the court took judicial notice of her testimony that she was involved in lottery operations. Appellant Hall complains that this is a violation of her Fourth Amendment rights. See *Simmons v. United States*, 390 U. S. 377 (SC , LE2d) (1968). This case was tried by the judge without a jury and the judge had already heard the admission when hearing the motion to surpress. Assuming but not deciding that appellant Hall's Fourth Amendment rights were violated a review of the record convinces us that any such violation was harmless beyond a reasonable doubt.

Judgment affirmed. All the Justices concur.

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

ATLANTA, 5/4/76

DEAR SIR:

The motions for rehearing were denied today:

Case No. 30939, Lawson et al. v. The State

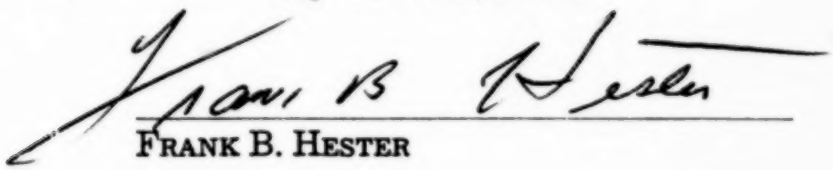
Yours very truly

MRS. JOLINE B. WILLIAMS, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia three copies of the foregoing Petition For A Writ of Certiorari to the Supreme Court of Georgia with first class prepaid postage addressed to Honorable Ben J. Miller, District Attorney, Griffin Judicial Circuit, Thomaston, Georgia 30286.

This 30th day of June, 1976.



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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1975

NO. 76-12

BOBBY JOE UPTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

October Term 1975

NO. 76-12

BOBBY JOE UPTON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The State of Georgia strongly opposes the Petition for Writ of Certiorari in the above-stated case and respectfully files this Brief in Opposition, pursuant to Revised Rule 24 of this Honorable Court.

JURISDICTION

The jurisdiction of this Court to consider this Petition for Certiorari, pursuant to 28 U.S.C. 1257(3), is conceded by Respondent. However, Respondent contends that Petitioner lacks legal standing to attack the

constitutionality of the Georgia wiretap statute, under the facts of this case.

QUESTIONS PRESENTED FOR REVIEW

Although the question presented for review as posed by Petitioner is technically accurate so far as it goes, it does not place in proper perspective for this Court's consideration all of the pertinent legal and factual elements which are essential to a complete understanding of the actual issue. Therefore, we will restate Petitioner's Question, as two questions, as follows:

I.

Whether the fact that the Georgia court-authorized wiretapping statute (*Ga. Code Ann.* § 26-3004), which was enacted prior to the enactment of its Federal counterpart (18 U.S.C. 2510-2520), does not contain some of the requirements of the aforesaid Federal statute, requires a ruling that the Georgia statute is unconstitutional where:

(a) the Supreme Court of Georgia has consistently held that the provisions of the Federal wiretap statute are controlling and that the Georgia wiretap statute is supplementary thereto; and

(b) in the instant case, all of the requirements of the Federal statute were substantially complied with notwithstanding the absence of some of those requirements in the Georgia statute.

II.

Under the foregoing circumstances, whether the Petitioner has legal standing to challenge the constitu-

tionality of aforesaid Georgia statute because of its lack of conformity in some respects with the Federal statute where he can show no violation of any requirement of the Federal statute as applied to him.

STATEMENT OF THE CASE

(a) Inaccuracy in Petitioner's Statement.

Petitioner's statement is essentially accurate, with the exception of the sentence, "All alleged gambling communication being intercepted therefrom originated in her (Petitioner's mother-in-law who resided next door to Petitioner) residence and without Petitioner's knowledge" (Petition, p. 8. Explanatory words inserted). This is a pure conclusion on the part of Petitioner and is not supported by the evidence.

Both telephones in the mother-in-law's house were listed in Petitioner's name and at his residence, not at hers (Tr. 225-227). An extension line unauthorized by the telephone company had been run between telephone number 461-1927 in Petitioner's home to a telephone in the mother-in-law's residence next door (Tr. 148-149; 225-227). The wiretap was connected *to Petitioner's telephones* (Tr. 148-149); more than one thousand lottery bets were transmitted to the mother-in-law over the latter telephone in two days' time (Tr. 150-151; Tr. 192). It is therefore quite apparent that the intercepted gambling conversations could have originated in either Petitioner's residence or the next door residence, since his telephone and the extension were both operative (Tr. 215-216, 220). Petitioner's knowledge of the illegal gambling use of his telephone can be inferred from his providing his mother-in-law a "cover" from which to operate her two to three million

dollar per year lottery (Tr. 192). In any event, the sufficiency of the evidence against Petitioner has been decided adversely to him by the Georgia Supreme Court. It is not a Federal question and is not an issue in this Petition.

(b) **Other Factual Statements in Other Portions of Petition are not Fairly Comprised Within the Question Presented by Petitioner.**

Petitioner's "Question Presented for Review" (Petition, p. 2) is an attack upon the constitutionality of the Georgia wiretap statute and nothing more. Nevertheless, in his section devoted to argument he alleges facts which have no relationship whatever to that question and are not fairly comprised therein. These irrelevant contentions are that the facts in the probable cause affidavit upon which the interception order was issued are untrue (Petition, p. 13); contain no probable cause as to Petitioner (Petition, p. 15); do not contain a complete history of prior electronic surveillance of persons named therein (Petition, p. 13); and does not contain a complete statement that other investigative procedures have been tried and failed (Petition, p. 13). These issues have been ruled upon adversely to Petitioner by the Supreme Court of Georgia (see opinion of the Court, pps. 48-52, Petition), and Respondent will not encumber this brief by arguing them further, since these issues are completely separate and unrelated to the constitutionality of Georgia statute under attack by Petitioner, which is the sole question raised before this Court by Petitioner.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

I. GEORGIA COURTS HOLD THAT TITLE III IS THE CONTROLLING WIRETAP STATUTE; TITLE III WAS COMPLIED WITH IN THIS CASE.

(a) **The Georgia Wiretap Statute, being Enacted Earlier, does not conform in all Respects to the Federal Statute; However, It is not Repugnant to the Federal Statute in any Material Respect.**

Respondent frankly concedes that in a number of respects the Georgia statute governing court-authorized wiretaps does not track the provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 211-225, Chapter 119 of Title 18, United States Code (hereinafter referred to as "Title III" for brevity). However, there is a logical reason why it does not. The General Assembly of Georgia enacted, effective April 19, 1967 an Act entitled "Eavesdropping, Peeping Tom and Invasion of Privacy." See Georgia Laws 1967, pp. 844-852. The Act struck in its entirety former Georgia Code Chapter 26-20 and inserted Sections 26-2001 through 2011 in lieu thereof. In general, the Act made it a felony, among other prohibited eavesdropping acts, to intercept the contents of a message sent by telephone, telegraph, letter or other means of private communication. However, Section 26-2005 contained an exception as to law enforcement officers acting pursuant to court order in the investigation of certain enumerated crimes. Former Section 26-2005(c).

It should be noted that this statute was enacted *prior*

to the enactment of Title III, which became effective more than a year later on June 19, 1968. Therefore, there was no effective way in which the Georgia General Assembly could conform its wiretapping exception for law enforcement officers to a proposed Federal statute not yet enacted or approved in final form.

The next year, on April 10, 1968, the Georgia General Assembly enacted an entirely new, revised and updated Criminal Code of Georgia, to become effective on July 1, 1969. Georgia Laws 1968, pp. 1249, 1328. As a part of this new Code, Section 26-2005, relating to court-authorized wiretapping, was reenacted verbatim as Section 26-3004. This re-codification also occurred prior to the effective date of Title III. This Section is the one under attack as being unconstitutional in the instant petition.

Certain minor amendments not pertinent to the issues here were enacted in 1972. Georgia Laws 1972, pp. 615, 952-953.

Generally, the Georgia statute's lack of conformity to certain parts of Title III consists of *omissions* of certain Federal requirements. For example, the Georgia statute does not require the interception order to contain the minimization directions required by 18 U.S.C. 2518(5). However, no portions of *Ga. Code Ann.* § 26-3004 are constitutionally *repugnant* to Title III.

The failure of the Georgia statute to closely conform to certain portions of Title III does not render it unconstitutional, however, because of the decisions of the Georgia Appellate Courts which apply the requirements of Title III to State wiretap investigations, applications and court orders. Furthermore, a person such as this

Petitioner whose telephone is wiretapped by State officers pursuant to an order issued by a State Superior Court Judge wherein all requirements of Title III are complied with has no standing to contest the alleged inadequacies of the Georgia statute.

(b) **Georgia Appellate Courts have Uniformly applied the Standards of Title III to Wiretap Investigations by State Officers under the State Statute.**

In the first appeal arising from a court-authorized wiretap conducted under State law to reach the Supreme Court of Georgia, the order authorizing the wiretap and the renewal order failed to include the Federal provisions that they be executed as soon as practicable; failed to state whether interceptions should terminate when the described communication was first obtained; failed to direct that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception and failed to direct that the interception must terminate upon attainment of the authorized objective. There are requirements of 18 U.S.C. 2518 (4)(e) and (5) but are not required by *Ga. Code Ann.* § 26-3004. The Supreme Court of Georgia said in that case, *Cross v. State*, 225 Ga. 760, 171 S.E.2d 507 (1969), that the failure of the order to include the foregoing directions "requires a reversal of the verdicts of guilty and judgments of convictions because of the failure of the court to exclude evidence thus illegally obtained in violation of those provisions of the Federal Act."

In the *Cross* decision, supra, the Georgia Supreme Court declined to rule upon the constitutionality of the Georgia statute because of its rule of abstaining from passing upon the constitutionality of an Act of

the General Assembly where there is any other proper basis upon which to render a valid judgment. See *Lively v. Grinstead*, 210 Ga. 361, 80 S.E.2d 316 (1954). The Court added in *Cross*, supra, ". . . because if Chapter 119 was not complied with a reversal of the conviction is required irrespective of that question (the constitutionality of the Georgia statute)" (225 Ga. at 765. Explanatory words inserted).

This unanimous, full bench 1969 decision of the Georgia Supreme Court, which has not been modified, overruled or distinguished to date, shows conclusively that the highest court of the State of Georgia recognizes the controlling authority of Title III and will reverse State Court convictions arising from wiretaps not obtained in full compliance with that Federal statute, even though *Ga. Code Ann.* § 26-3004 may not have exactly the same requirements.

More recent decisions of the Georgia Supreme Court also recognize the controlling effect of Title III in State-conducted wiretaps. In *Granese v. State*, 232 Ga. 193, 196, 206 S.E.2d 26 (1974), that Court said ". . . Our Georgia statute is supplementary of the Federal statute." In *Orkin v. State*, 236 Ga. 176, 179, ____S.E.2d____ (1976), the Georgia Supreme Court reiterated that the requirements of both Federal and State law regarding wiretapping must be satisfied where applicable.

It should be noted in passing that the Supreme Court of Georgia, in *Granese v. State*, supra, upheld the constitutionality of *Ga. Code Ann.* § 26-3004 against contentions that it abridged constitutional freedom of speech, authorized unreasonable searches without probable cause, violated the right to counsel and privilege against self-incrimination, and denied due process of law.

(c) **All of the Mandatory Requirements of Title III were complied with in this Case.**

Counsel for Respondent will briefly document those material requirements of Title III not required by the Georgia wiretap statute which were complied with in the instant case. We will do so by references to either (1) the opinion of the Georgia Supreme Court affirming Petitioner's conviction, being *Lawson et al. v. State*, 236 Ga. 770, ____S.E.2d____ (1976) and reproduced in the Petition at pages 48-52; (2) the probable cause affidavit, Petition, pages 17-34; (3) the court order, Petition, pages 35-38; or (4) appropriate pages of the trial transcript (Tr.).

The following requirements of Title III were complied with in the instant case, though not required by the Georgia statute.

1. **Minimization.** Interceptions terminated on number of nonrelevant conversations. Interceptions terminated after two days though authorized for 20. *Lawson*, supra, Div. 2, Pet. p. 50; Court order requires minimization, Pet. p. 38.

2. **Other investigative methods tried and failed.** Affidavit, Pet. p. 28-29; *Lawson*, supra, Div. 1, Pet. 48-49.

3. **Inventory to those intercepted.** Actual notice given five days after termination of wiretap through service of search warrants and affidavits detailing wiretapped conversations. Tr. 354-359; State's Exhs. 15, 16.

4. **Statement in application of all known prior applications for wiretap orders for same persons or places.** Court notified of two prior wiretaps, one in application (see Pet. p. 32), and another by investigating officer (Tr. 71). See *Lawson*, supra, Div. 4, Pet. p. 51-52.

5. **Interceptions to commence as soon as practicable.** Interception order directs surveillance to begin at 12:01 p.m., September 24, 1974 (the day after Court signed order). Interception order, Pet. p. 36.

6. **Duration of interceptions.** Court order authorizes interceptions for 20 days, (or) until all relevant conversations are seized. Court Order, Pet. 37.

The one provision of Title III not duplicated in the Georgia statute which was not complied with in this case was the *discretionary* authority of the Court to require progress reports, authorized by 18 U.S.C. 2518(6). However, a Federal Judge may dispense with progress reports entirely. *United States v. Iannelli*, 3 Cir. 1973, 477 F.2d 999, affirmed 95 S.Ct. 1284; *United States v. Falcone*, D.N.J. 1973, 364 F.Supp. 877, affirmed 500 F.2d 1401. In this case, even had the Superior Court Judge required progress reports, the voluntary termination of interceptions after two days would no doubt have preceded the first reporting date.

In summary, this Petitioner's telephones were wiretapped precisely as they would have been if it had been a Federal investigation under authority of an interception order signed by a United States District Judge. Petitioner was deprived of none of the statutory or constitutional safeguards of Title III. Therefore, whether *Ga. Code Ann.* § 26-3004 contains all of those provisions is immaterial in a constitutional sense.

II. THIS PETITIONER HAS NO LEGAL STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE GEORGIA WIRETAP STATUTE BECAUSE IT WAS CONSTITUTIONALLY APPLIED AS TO HIM AND HE HAS SUFFERED NO HARM THEREFROM.

Having demonstrated heretofore that all substantial requirements of Title III were complied with in this case, notwithstanding the absence in the Georgia statute of some of those requirements, Respondent respectfully insists that the Georgia statute was applied constitutionally as to this Petitioner. He therefore does not have legal standing to attack those alleged deficiencies in *Ga. Code Ann.* § 26-3004 because he was not harmed in the slightest manner thereby. The Supreme Court of Georgia has so ruled in this case.

In *Lord v. State*, 235 Ga. 342, 219 S.E.2d 475 (1975), the Georgia Supreme Court held that where a party attacks a statute as being unconstitutional, he must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of rights protected by the United States or Georgia Constitution or both.

This Honorable Court has firmly established and adhered to a similar rule in the landmark case of *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960), in which Mr. Justice Brennan said, speaking for the Court without a dissent, in pertinent part:

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its ap-

plication might be unconstitutional." (Citations omitted).

Thus, since any alleged deficiencies in the Georgia wiretapping statute were not applied harmfully to Petitioner because of the strict adherence to the requirements of Title III, he completely lacks legal standing to attack the constitutionality of *Ga. Code Ann.* § 26-3004.

CONCLUSION

The wiretap of Petitioner's telephones having been authorized and conducted in full compliance with Title III, he lacks legal standing to challenge the constitutionality of the Georgia statute providing for court-authorized wiretaps on the grounds that it fails to embody certain requirements of Title III. Even if he should have standing, the statute is constitutional because of its construction by the Supreme Court of Georgia as supplementary of Title III.

Respondent therefore respectfully urges this Honorable Court to overrule and deny the Petition for Writ of Certiorari to the Supreme Court of Georgia in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have on this date deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of the State of Georgia in Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia with first class prepaid postage addressed to Frank B. Hester, Esq., Attorney at Law, 215 Ten Pryor Street Building, Atlanta, Georgia 30303, the counsel of record for Petitioner Bobby Joe Upton.

This 29th day of July, 1976.

/s/RICHARD L. CHAMBERS

RICHARD L. CHAMBERS